No. 15080

In The

United States Circuit Court of Appeals

For the Ninth Circuit

E. J. STANFILL, as Trustee,
and ELFRIEDA MAY,
Appellants,

vs

RALPH B. DEFENBACH, as Trustee,
Appellee.

BRIEF OF APPELLANTS

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

HONORABLE SAM M. DRIVER
United States District Judge

S. DEAN ARNOLD
517 Sycamore Street
Clarkston, Washington

C. C. ROWAN
1021 Paulsen Building
Spokane, Washington

Attorneys for Appellants

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2. Do not the minor beneficiaries under a trust agreement acquire a vested interest by use of the words "with absolute right vested in the trustee"?

3. Does the reservation in a life insurance trust to "pledge as collateral or exercise the loan rights" include the right to change the beneficiary?

4. Does a reservation in the alternative permit the exercise of both options?

5. Does not the reservation of a specific right exclude those powers not reserved?

6. Was not the Defenbach agreement subject to an irrevocable 15 year trust to Stanfill to protect children during their minority?

7. Is the Defenbach Agreement (Ex 27) a power of attorney, a mortgage, an operating agreement or an assignment for the benefit of creditors?

8. Was not the Defenbach Agreement intended to terminate upon the death of Robert Weyen?

9. Should not Appellant Elfrieda May in equity be returned the $3,000.00 she paid to enable the creditors to secure the Defenbach agreement?

JURISDICTIONAL STATEMENT

THE SUN LIFE ASSURANCE COMPANY OF CANADA, instituted an action in District Court against appellants, appellee and others, interpleading all, and paying some $63,500.00, proceeds of life insurance policies on the life of Robert Weyen, deceased, into court and requiring all defendants to interplead their rights. (R. 3). Appellants answered, claiming all the proceeds by virtue of a Trust Agreement (Ex 25) (R. 15) and appellee answered claiming all proceeds except those of the policy in Count I by virtue of the assignment to appellee, as Trustee. (Ex. 27) (R. 29).

Sun Life Assurance Company of Canada is a Canadian corporation; appellee is a citizen of the State of Idaho; Appellants of Oregon and California; and Mary P. Weyen of the State of Washington.

Jurisdiction of the District Court arises under the Act of June 25, 1948, The Judicial Code, 28 USC, Sections 1332, 1335, 1391 and 1397 and Rule 22 of the Federal Rules of Civil Procedure. Jurisdiction was not questioned.

Upon trial, without a jury, before Honorable Samuel M. Driver, Findings of Fact and Conclusions of Law, in favor of Ralph B. Defenbach, as Trustee, were made, and Judgment dated December 30, 1955 was entered accordingly. Upon motion timely made, the trial court, on January 19, 1956, denied appellants' Motion to Amend the Findings, Conclusion and Judgment. Notice of Appeal from that Judgment and from the Order Denying Motion to Amend, was duly served and filed February 15, 1956.

Jurisdiction of this court arises under the Act of June 25, 1948, 28 USC, Sections 1291 and 1294 (1). and under Rule 73, Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

28 USC 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and is between:

(1) Citizens of a different State;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 USC 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of the interpleader or in the nature of interpleader filed by any person, firm or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance or other instrument of value or amount of $500 or more, or providing for the delivery or payment of the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more if (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the

amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

28 USC 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 USC 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one of more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936.

Rule 22—Federal Rules of Civil Procedure:

Interpleader.—(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U.S. C., Title 28, Sec. 41 (26). Actions under that section shall be conducted in accordance with these rules.

Rule 73, Federal Rules of Civil Procedure

Appeal to a Court of Appeals

(a) When and How Taken.

" . . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders. . . . denying a motion under Rule 59 to alter or amend the judgment. . . ."

STATEMENT OF THE CASE

(All emphasis throughout, ours)

The facts are undisputed. September 22, 1953, Robert Weyen, divorced his wife in Asotin County, Washington, Superior Court and was required by Court Order to pay $200.00 per month for the support of minor children, then age 7 and 9, with custody awarded to the wife, and a property settlement made shortly before was approved by the court. (Ex 23). September 23, 1953, Weyen executed his Last Will and Testament, containing the following provisions:

> "SECOND: I make no provision for my children, namely, Daryl Weyen and Carolyn Weyen, because I have heretofore provided for them through Insurance Policies on my life; however, should said polices lapse or become null and void I hereby give, devise and bequeath to my said children the sum of $10,000 share and share alike". (Ex 24).

On the same day, Weyen executed a trust agreement (Ex 25) conveying beneficial rights in certain insurance policies (no other property) to E. J. Stanfill, in trust for fifteen years for the benefit of said minors. The agreement is designated "Trust Agreement". It contains no power of revocation in whole or in part. It directs the trustee to

> "hold and administer the said insurance policies and the proceeds thereof"

and then contains the following provisions:

"4. All proceeds of said policies, inclusive of all rights to take and receive payment of cash, surrender or loan payments and all dividends or distributions payable either to the insured or the beneficiary, shall be payable and be paid to the Trustee, and no insurance company issuing any such policies, or making any such payments shall be responsible for or be required to look to the proper discharge of the trust hereof or the application of such payments by the Trustee, and with the absolute right vested in the Trustee to pledge any such policy as collateral, surrender the same either for cash of paid-up insurance value or avail itself of any option granted in any such policy to the insured and his assigns, without the signature or assent of the donor."

It also provides:

7. "The donor specifically reserves the right, during the term of this trust, to pledge any of such policies as collateral 'or' to exercise the loan right as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans."

The trust contains no other reservation and no right of revocation.

The sole "Trust Res" was the beneficial rights in the policies, in case of death, and ran for fifteen years only.

The insurance company issuing the policies was furnished a copy of this trust agreement and their printed form for change of beneficiary was executed by Weyen, and Stanfill was formally made the beneficiary of the policies for the benefit of the minor children. (R. 122, 147)

Stanfill and Defendant Elfrieda May (the mother of Weyen) held the policies for some time and paid the premiums hereon. Weyen had borrowed against some of these policies before execution of the trust (Exhibit 1, 2, 3 & 4.) (R. 129)

In November, 1954, Weyen executed an instrument designated "Assignment to Trustee for Benefit of Creditors" to Ralph B. Defenbach, in which he assigned certain moneys, credits, equipment and timber contracts under an operating agreement, directing Defenbach to collect all income and pay out all funds in accordance with the directions contained therein. (Ex. 27)

After directing the collection and application of the income, and apparently as an afterthought as to future borrowing against the policies, the instrument recites that Weyen has the insurance policies above named and others, and,

> "has prepared the necessary documents to have party of the second part herein named his beneficiary for the benefit of the creditors joining in this assignment. . . ." (Ex. 27.)

However, Weyen executed only an assignment of the policies to Defenbach though stating by letter that the purpose of the assignment was to change the beneficiary. The company never formally changed the beneficiary to Defenbach nor were change of beneficiary forms ever executed. (R. 124). Assignee Defenbach subsequently exercised the loan rights on four policies (Ex. 5, 6, 7 and 8), being the policies on which Weyen had not previously borrowed money. (R. 129)

The agreement with Defenbach provides:

> "The Party of the First Part does hereby agree that this assignment shall constitute a Power of Attorney to Party of the Second Part to act in his behalf insofar as it may be required to carry out his duties under the terms of this assignment...."

It also provides:

> "The Party of the First Part agrees that this assignment shall constitute a mortgage upon all of the property listed herein."

Weyen died from an accident April 16, 1955.

Weyen's mother paid premiums on some of the policies at Weyen's request, because she had possession and understood that would protect her; she paid indebtedness of Weyen's of $3,000.00 before the Defenbach Agreement could be executed, and as a part thereof (R. 183, 184) and claims an equitable lien upon the policy proceeds.

Each policy involved (Ex 1-8) contains separate provisions and terms for change of beneficiary and for assignment reserved to the insured. These rights of the insured became vested in Stanfill by the Trust Agreement (Ex. 25) except those specifically reserved in paragraph 7 thereof; those reserving to Weyen only the right to "pledge. . . . as collateral" or, in the alternative, to "exercise the loan rights". Nothing passed to Defenbach except what was specifically reserved. At the time of the execution of the Stanfill Trust on September 23, 1953 the loan rights had already been exercised on Exhibits 1, 2, 3 and 4. After the Assignment to Defenbach and in February, 1955, Defenbach used the alternative reservation by exercising the loan rights on Exhibits 5, 6, 7 and 8 (R. 129, R. 175). At the time of Weyen's death, he and Defenbach had previously exercised all the rights reserved to the insured.

SPECIFICATIONS OF ERROR

I.

The court erred in that portion of Findings of Fact No. VI, reading:

> "... the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home office of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary thereunder. ..."

II.

The court erred in that portion of Finding No. VIII, reading:

> "... . It was not necessary for him to change the beneficiary in order to accomplish that purpose; that in executing the Assignment to Trustee for Benefit of Creditors dated November 16, 1954, Robert F. Weyen intended to pledge his assets including his life insurance as security for the payment of his debts"

III.

The court erred in Conclusion of Law No. First, reading:

> "That the seven (7) insurance policies involved in this action and assigned to Ralph B. Defenbach by their language recognize the right of the insured to assign the same and that under the terms of the trust agreement dated September 23, 1953, Robert F. Weyen reserved the right to pledge any of such polices as collateral; that the defendant Ralph B. Defenbach therefore will recover the net proceeds of all life insurance policies impleaded herein except Policy No. 1 477 698, which was assigned to Elfrieda May".

IV.

The court erred in that portion of the judgment entitled "first" awarding Ralph B. Defenbach, trustee, all the net proceeds of the seven policies listed.

V.

The court erred in construing the Stanfill Trust, Exhibit 25, to be revocable as against Weyen's minor children, the cestui que trust.

VI

The court erred in holding the Stanfill Trust did not immediately vest an interest in Weyen's minor children for fifteen years as to the beneficiary of the insurance policies conveyed in trust.

VII

The court erred in holding the Defenbach assignment, Exhibit 27, covered the proceeds of the policies involved, upon Weyen's death.

VIII.

The court erred in refusing to allow Elfrieda May and E. J. Stanfill, as trustee, the $3,000 paid to Weyen's creditors to enable them to obtain the Defenbach agreement.

SUMMARY OF ARGUMENT

On Sepember 23, 1953 Weyen established a 15-year irrevocable insurance trust in favor of his minor children (Ex. 25). He caused the beneficiary of the several policies (Ex 1-8) to be changed to the Trustee and delivered the policies to the Trustee, thereupon fully executing the Trust conveyance. By conveying for 15 years he suspended his right to change beneficiaries or do anything else with the policies, except as reserved to himself in paragraph 7. Paragraph 4 of the Trust Agreement gives Stanfill "rights to take and receive payment of cash, surrender or loan payments or all dividends or distributions payable either to the insured or the beneficiary. . . . with absolute right vested in the Trustee to pledge any such policy as collateral, surrender the same either for cash of paid-up insurance value or avail itself of any option granted in any such policy. . . ."

The key to this litigation rests on the interpretation of paragraph 7 of the Trust Agreement, quoted as follows:

> "The donor specifically reserves the right, during the terms of this trust, to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies, and in the event the donor makes application for such loans, it is hereby expressly understood that the signature of the Trustee named herein shall not be required to join in the application for said loans."

This paragraph read in its entirety only reserved to Weyen the right to borrow by one of two alternative methods: to exercise the loan rights with the company or to pledge the same to another loan agency or

procure a bank loan thereon. Loans on policies as a practical matter are limited to cash surrender value. It will be noted also that the reservation is in the alternative. The Trust Agreement did not reserve:

1. The right to revoke.
2. The right to change beneficiary.
3. The right to surrender for cash.
4. The right to destroy the protection extended to the minor children for the 15 year duration of the Trust.

Weyen's intent to protect his children against everything but the loan value of the policies is clearly expressed in the Trust Agreement and confirmed by his Last Will and Testament (Ex 24) which otherwise disinherited his children except in the event of lapse of the policies.

As further confirmation of his intent, he caused the Trust Agreement to be recorded.

The subsequent assignment to Defenbach is ineffectual to carry the ultimate beneficiary death payments for two reasons:

1. The insured Weyen did not reserve the right to change the ultimate beneficiary for 15 years but only the right to borrow the cash surrender value, and,
2. The reservation contained in paragraph 7 was in the alternative to pledge or exercise the loan rights.

Weyen had already exercised the loan rights on the four policies (Ex 1-4) and Defenbach subsequently exercised the loan rights on the four remaining policies (Ex 5-8) thus both Weyen and Defenbach by their respective elections foreclosed themselves of the right to pledge. By reserving specific rights the Trustor Weyen excluded all other reservations. Expressio Unius Ex Exclusio Ulterious.

Appellant is relying upon the strength of his own case as above set forth, but nevertheless points out the weakness of Appellee's position:

1. The Defenbach Agreement has never been construed as to whether it is a mortgage, a pledge, a power of attorney, an assignment for the benefit of creditors or an operating agreement terminating upon the death of Weyen.

2. An assignee for the benefit of creditors is never a bona fide purchaser. Accordingly, Defenbach took with constructive notice of the prior 15 year Stanfill Trust.

3. Even so, Defenbach paid no consideration therefor. The proceeds of the policy loans to Defenbach exceeded the premiums paid thereon by Defenbach (R. 171). Elfrieda May advanced $3,000.00 to creditors (R. 184) at the time of the Defenbach assignment and paid the attorney fee therefor. (R. 181)

4. Defenbach has made no accounting to determine the value of the assets other than insurance or to show the need for funds.

5. The Defenbach transaction attempts to do indirectly what it cannot do directly, that is, change the beneficiary under the guise of an assignment.

The control of the policies by the insured, while absolute at the outset, may be limited in those instances where the insured by his own act has barred his own right of control by creating an irrevocable vested interest in others, as he has done here.

Since this is an equitable action, the $3,000.00 advanced by Elfrieda May in cash to Weyen and his creditors to pay life insurance premiums and other obligations should in good conscience and equity be awarded to her.

ARGUMENT

Specifications of Error I to IV, inclusive, all involve the construction of Exhibits 25 and 27 and in particular whether Exhibit 25 is a "Trust Agreement" and for convenience are all discussed together.

The insurance contracts provide:

> "Subject to the rights of any assignee of record. . . . the contractor may assign or pledge. . . . every right. . . . conferred by the policy".

Stanfill was already the Trustee—beneficiary of record when Weyen attempted to assign to Defenbach. Therefore under the insurance contract itself the Defenbach assignment was subject to the rights of Stanfill as trustee (and of course the minor children) and since Weyen had not reserved the right to change the beneficiary in the Stanfill Trust, he could not make Defenbach the beneficiary. Weyen clearly intended to protect his children for fifteen years in the event of his death regardless of what might occur. He used expressive language in so doing. For example "the absolute right vested in the Trustee" even to surrender for paid up policy. He reserved the "accumulations" or the "loan rights" to himself so that he could borrow thereon from time to time but indicated no intention to reserve the right to change beneficiary. He could borrow against the policies or he could pledge them as security to borrow against them but he could not defeat the rights of the minor children. Weyen reserved the right "to borrow or to pledge" but did not reserve (1) the right to revoke in whole or in part, (2) the right to change beneficiary, (3) the right to surrender for cash, (4) the right to do

anything that would destroy the protection given the children, or (5) the right to assign to another, except for loan purposes.

Weyen intended to protect his children until they were of age if he should die. He retained the earnings or accumulations on the policies for himself and his creditors but not the beneficial rights in case of death.

The trial court overlooked the fact that the insurance contracts between the Sun Life and Weyen clearly distinguished between (1) the loan rights, (2) the death benefits, (3) the right to change beneficiary and (4) the right to assign. The policies contained separate and distinct paragraphs limiting each right. Weyen was required to use the form of the insurance company to change beneficiary in order that the company might stop a further change after the policies had been assigned. The policies so provide. Weyen had conveyed to Stanfill as trustee by Exhibit 25 and under the policies any change of beneficiary was "subject to the rights of Stanfill as Trustee". Weyen used the company form when naming Stanfill as trustee but did not do so as to Defenbach. Without doubt the company would not have honored any such change because it was in violation of the insurance contract, and the trust agreement.

The trial court also overlooks the fact that the usual insurance policy distinguishes between the rights of the insured and the rights of the beneficiary. The latter are not exercised until the insured is deceased and once a trustee is made the beneficiary in a trust not revocable, all rights of the insured thereafter are "subject to the rights of such trust beneficiary".

The insurance contract recognizes Weyen's right to assign from time to time but not after he has already conveyed in trust without reserving the right to revoke.

Specifications V and VI both involve the construction of the Stanfill Trust, (Ex. 25) and are discussed together.

IRREVOCABILITY

A trust created is irrevocable even though voluntary.

Holmes v. Holmes, 65 Wash. 572, 118 Pac. 733

28 Am. Eng. Encyc. Law (2d) pg. 899

32 L. R. A. (NS) 645.

The Washington court recently said:

"The insured had made an equitable assignment of the policy to respondent in 1932. . . . It is true that no formal assignment of the policy was executed as required by. . . . the policy. . . . but. . . . it was the insured's intention on October 28, 1932 to transfer to respondent a present interest in the ultimate proceeds of the policy. . . . the fact that the insured thereafter. . . . was. . . . enabled to procure a change of beneficiary cannot be held to operate to divest respondent of the rights theretofore vested in her. . . . there was in this instance, not only a good consideration, found in the relationship of the parties, in the. . . . insured's motives of natural duty and prudence. . . . The agreement was valid and fully performed. The insured could not thereafter repudiate it, as he apparently attempted to do. . . . His attempted change of beneficiary was ineffectual as to the respondent. . . ."

Sundstrom v. Sundstrom, 15 Wn. (2d) 113, 116

The dissent of the present District Judge, then an Associate Justice of that court was because the agreement was oral and was supported only by respondent's testimony but this case has never been overruled. Here Appellant's proof is in writing, acknowledged and recorded.

Since jurisdiction in the instance case is based upon diversity of citizenship of the parties, the governing substantive law is that of the State of Washington.

> "In these modern, complex times, the right of every man to use his accumulations to pay his debts, especially when he has pledged them to obtain liquid capital, ought not to be limited or abridged,
>
> except only in those instances where, by his own act, he has barred his own right of control by creating an irrevocable vested interest in another or others.
>
> Life insurance, during the life of the insured forms a reserve to be drawn upon in times of stress and many have improved their fortunes and bettered the condition of their dependents by drawing liquid capital from that source to enable them to maintain or renew their business activities."

Mass. Mutual v. Bank of Cal. 187 Wash 565

The above quotations state the general rule, the exception and the explanation. The trial court based its decision upon the general rule. Appellant relies upon the exception voiced in the second section. The third portion justifies the first in its justification limits it to the practice of "drawing liquid capital."

The only liquid capital to be drawn on a life insurance policy must be drawn during the life of the insured, and should not be confused with those benefits arising only after death.

There is no implied power in the settlor to revoke or modify a trust. The settlor cannot revoke the powers reserved and the consent of minors to revocation cannot be obtained.

Simon v. Reilly, 10 Atl. (2d) 474

Bogert on Trusts, Vol. 4 (1) para 993

Since neither the settlor nor the trustee acting individually can revoke a trust, neither can they do it together. A mere agreement to do so is ineffective.

Morrison v. Nugent, 36 N.E. (2d) 581

Bogert on Trusts, Vol. 4 (1), para 1001

Even a power reserved to the settlor to demand and receive from time to time, a part of the corpus of a trust for his own personal needs, is proper as reserving the right to a partial revocation but it cannot be used as a subterfuge for a complete revocation.

Lovett v. Farnham, 47 N.E. 246

Bogert on Trusts, Vol. 4 (1), para 993

It is a general rule that where a valid and effective voluntary trust has been created, and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder.

Stoehr v. Miller, 296 Fed. 414

Roberts v. Taylor, 300 Fed. 257

At any rate the court interprets the contract made by the parties and does not attempt to make a better one.

In re Wilson, 256 Fed. 966

Collins v. Northwest, 180 Wash. 347

The general rule is that where a valid and effective voluntary trust has been created, and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder.

Adams v. Hagerott, 34 F. (2d) 899

Taylor v. Bunnell (Calif.) 23 P. (2d) 1062

The court awarded a trust estate to the plaintiff as the heir at law of the trustor, for the reason, inter alia, that the trustor, having once established the trust, could not revoke it, since there was no power of revocation reserved in the trust agreement.

Fry v. Pence (1931) 261 Ill. App. 218

The trustor had established a valid trust which he could not revoke merely because he had had a change of heart or because he felt that he had done something which he desired to undo.

Price v. Price, 162 Md. 656

The interest of the plaintiffs in the trust property had vested and the trustor could not revoke the trust without the consent of the beneficiaries.

Ketcham v. Miller, 37 S. W. (2d) 635

The trust being thus perfectly created, and there being no power of revocation reserved, the trustor

could not, by his subsequent acts, affect it.

Hamilton Trust Co. v. Bamford, 105 N.Y.Eq. 249, 147 A. 909

A trustor cannot revoke a trust the income of which she was to receive for life.

Pickett v. Geer, 156 S. C. 346, 153 S. E. 349

The court is relegated to determining from all the evidence what the trustor then wanted done with the fund under all the circumstances. Obviously, Stalder's last will, that is, the will he actually left in force, would be very relevant to such an inquiry.

Stalder v. Pacific National Bank, 28 Wn (2d) 644, 648

2 Restatement of Law of Trusts (see pg. 337) says:

"Even though they all (the beneficiaries) consent, they cannot compel the termination of the trust if its continuance is necessary to carry out a material purpose of the trust."

Since the Trust Agreement and the Will were to "effect a single purpose", they must be construed together to determine the intent of the parties.

Fowler v. Lanpher, 193 Wash. 315.

Insurance trusts in favor of settlor's family are preferred over the claims of creditors.

In re Bosck, 12 Fed. Supp. 279.

THE INSURED'S INTENTION IN ASSIGNING SHOULD ALWAYS CONTROL.

Mutual Benefit Life v.Clack.254 Pac.306 (Calif.)

The following facts are significant:

A. The minor children were made the beneficiaries (through Stanfill as Trustee) for fifteen years absolutely.

1. Absolute rights vested in Stanfill as trustee.

2. Admittedly something was conveyed because Stanfill was required to reconvey to Weyen at the end of a fifteen year term.

3. Loan rights (accumulations) and right to pledge therefor, are the only reservations in donor.

4. No power of revocation was reserved in whole or in part.

5. Donor's intent, at the time trust was made, governs.

B. This beneficial interest vested in the minors immediately and could not be taken from them without consideration.

C. No right to change the beneficiary was reserved —Expressio Unius ex exclusio ulterious.

D. Weyen's Will and his recording of the Stanfill Trust and furnishing the insurance company with copy of the Stanfill Trust, all conflict with the trial court's decision.

The use of the word "or" in the reservation in paragraph 7, (Exhibit 25) left Weyen and his assignee, Defenbach, only an alternative. The word "or" is a coordinating participle that marks an alternative, meaning one or the other, but not both. 30 Words & Phrases, 1956 Sup. p 20 The word "or" is used in the sense of "and" only when the obvious sense requires it. 30 Words & Phrases, 1956 Sup. p 69.

Without resorting to voluminous citations it would appear that in statutory construction the Courts are more inclined to use the words "and" and "or" interchangeably but that in private contracts the words are given their respective strict construction unless necessary to give sense to the instrument being construed.

> "Where testamentary trust provided that testator's married daughters, respectively, should have use and 'possession' of, 'or' 'rents and Profits' accruing from, lands described, trustees had power of election between alternative benefits, since word 'or' could not be properly construed as 'and'. Word 'or' is defined as a co-ordinating particle that marks an alternative. . . ."
>
> Lancaster v Marshall (Neb) 264 N.W. 470, 475

Since Weyen's original intent was to protect the children in case of his death, and he confirmed this in his Will of the same date and emphasized it by recording the Trust Agreement and giving the insurance company a copy, and particularly since he reserved the right to borrow or pledge the policies but did not reserve the right to change beneficiaries or surrender the policies for cash, it is clear he then intended the trust to be complete and irrevocable for fifteen years as to beneficiaries and any attempted change of beneficiary to Defenbach was beyond his power.

VESTED INTEREST OF MINORS

COURTS CONSIDER THE PURPOSE OF LIFE INSURANCE IS TO PROVIDE FOR THE MAINTENANCE OF THOSE SURVIVING THE INSURED AND DEPENDENT ON HIM.

2 Appleman on Insurance 760

The vesting of estates is favored in the law.

Seattle First Natl.Bank v.Crosby,42 Wn (2d) 234

Where a policy of insurance is made payable to a child, it acquires a vested interest immediately upon the execution of the contract.

2 Appleman on Insurance 315

A policy taken out pursuant to agreement cannot be changed without the consent of beneficiary.

Wellhouse v. United Paper Co., 29 F (2d) 886

2 Appleman on Insurance 324.

The trustor executed a trust agreement for the benefit of her two children, and transferred 100 shares of stock as the trust res to the trustees. Later, she executed a purported trust in the exact language of the prior trust, except that, instead of 100 shares of stock being placed in trust, there were only 60 shares. The court held that the first trust, being a complete, executed voluntary one, without the power of revocation having been reserved, was a valid trust and the second trust was void.

Krause v. Jeannette Invest. Co. 62 S. W. (2d) 890

In Hurt v. Gilmer, 59 App. D. C. 282, 40 F. (2d) 794. the trustor and the immediate beneficiaries of the trust attempted to revoke it by mutual consent. The trust instrument provided that, at the expiration of a life estate, the corpus of the trust should go to the beneficiaries named therein, and in the event that any of the persons entitled to share in the remainder should pre-decease the beneficiary having a life estate, then the deceased remainderman's share should be

paid to her issue. The court held that this possibility of other beneficiaries coming into existence precluded the revocation of the trust by the mutual consent of the persons named therein..

A vested interest may prevent an assignment.

Potter v. Northwestern Mutual, 247 N. W. 669

An equitable interest may do likewise.

Aetna Life v. Morlan, 264 N. W. 58

An antenuptial agreement is a sufficient consideration for acquisition of a vested interest.

Kansas City Life v. Jones, 21 F. Supp. 159

A trust can be terminated in the lifetime of the settlor, by agreement of all parties, if beneficiaries are of full age.

Fowler v.Lanpher,193 Wash.308,75 Pac.(2d)132

A trust cannot be terminated by the trustee.

54 Am. Jur.—Trusts, Para. 77

If a trustee is not relieved by the beneficiaries, he must have court sanction.

54 Am. Jur.—Trusts, Para. 129

A trustee cannot be relieved where beneficiaries are minors or incompetents.

54 Am. Jur.—Trusts, para. 128

A life insurance policy for benefit of daughter, gives daughter a vested interest immediately upon delivery to father (insured).

Geoffrey v. Gilbert, 49 N. E. 1097 (N.Y.)

Johnson v. Roberts, 254 Pac. 88 (Okla)

A trustee having accepted, cannot divest himself of the office. A formal written resignation is ineffective.

Bogert on Trusts, Vol. 4 (1), para 511

Resignation by consent is impossible if beneficiaries are infants.

Bogert on Trusts, Vol. 4 (1), para 513

It is therefore not within the power of the trustor and her daughter together to alter or revoke the instrument, nor within the authority of the court to do so, since by the express terms of the trust others have a contingent right under it.

Underhill v. U. S. Trust Co., 227 Ky. 444, 13 S. W. (2d) 502

The trustors and the remaining beneficiary, desiring to revoke the trust, entered into a written revocation. Held, the trust was not revocable by the parties to the trust instrument, since it created a remainder in the next of kin of the trustors.

Whittemore v. Equitable Trust Co. 250 N.Y. 298, N.E. 464

Weyen's obligation to protect and support the children in the event of his death, the same as the $200.00 monthly payment while he lived, was sufficient consideration for assigning the policies in trust to Stanfill and making Stanfill, as such trustee, the beneficiary, until the children were of age.

Fowler v. Lanpher, 193 Wash. 308

The Stanfill Trust clearly spells out: "I hereby vest absolutely in you, the right to collect and pay out the

proceeds of these insurance policies, if I die within fifteen years".

If Weyen had intended to reserve the "right to change beneficiary" and the "right to surrender for cash", or the right to revoke or even to assign or sell, he would have said so in Paragraph VII of the trust agreement.

EXPRESSIO UNIUS EX EXCLUSIO ULTERIOUS

The trust was created for only fifteen years to protect the children until they were of age. The policies then reverted to Weyen in their entirety. All he reserved for 15 years was the right to use the "loan privileges" or the right "to pledge" the policies, the latter of which would carry the protection of the loan rights. That is all Weyen had reserved and hence all he could convey to anyone else. If the premiums were paid, the minors were protected as to the proceeds in the event of death, less the loans outstanding against the policies as provided in the insurance contracts.

The trial court, in order to emphasize the meaning of "the right to pledge or to exercise the loan rights" pointed out that the Stanfill Trust was "drafted by a lawyer". Therefore, we point out that the same lawyer inserted the word "or" instead of "and" as well as the language "with the absolute right vested in the trustee to pledge any such policy. . . . surrender the same either for cash. . . . or avail itself of any option. . . . without the signature or assent of the donor." The word "vested" must be given some meaning or held meaningless. If Weyen retained full control over the beneficiary, the pledge, the loan and all other rights, then the word "vested" is meaningless.

Nor should we disregard the fact that Weyen and his attorney, while specifically naming the rights he wished to reserve for some reason did not include either "the right to change beneficiary" or "the right to surrender for cash" or the "right to revoke" nor the "right to assign or sell". Clearly Weyen did not retain the authority to destroy the interest of the minors in the policies nor to retain exclusive jurisdiction over all of them—if so, then the trust is entirely meaningless and is nothing but a declaration of intention, revocable in its entirety.

The fact that he recorded the trust in Asotin County also indicates an intent to place it beyond his power to deprive the children of their "vested rights". His furnishing a copy to the insurance company shows his intention to make the "beneficial interest" irrevocable for fifteen years. Likewise, his will indicates his intention to protect the children, through the death benefits, for he did not make any provision as to the children if he "assigned or pledged" the policies.

The Stanfill Trust, in effect, says: "I vest in Stanfill absolutely, as trustee for my children, for fifteen years, the right to collect the proceeds of these policies and pay them out to the children as follows: (Then he gives explicit instructions for disbursing such proceeds). . . . Neither I nor my creditors can surrender the policies for cash, nor collect the proceeds if I die within 15 years. I reserve the right to borrow against the policies at any time or to pledge them to anyone else to do so". The he said, "I am recording this instrument so that neither I nor my creditors can deprive my children of this protection, even if this instrument is lost, or my creditors assail me, if I die

before the children are of age", and his will confirms the above intent.

THE TRIAL COURT'S DECISION MAKES THE STANFILL TRUST REVOCABLE IN WHOLE without any provision as to revocation even in part. In other words, the court construes the reservation of the right to pledge or borrow as a right to revoke completely as to beneficiaries and otherwise and thereby revoke the trust completely.

The only authority to Stanfill to convey to anyone is at the end of fifteen years (Paragraph VI). Note too, that Paragraph VI requires a "CONVEYANCE" back to Weyen.

SPECIFICATION NO. VII

Exhibit No. 27 was also drafted by a lawyer. The instrument states that Weyen is indebted to many persons and is willing "to convey all his property and future income along with all securities". At that point he does not mention the insurance policies or proceeds. His property and future income did not include the beneficial rights of the policies which had been conveyed in trust to Stanfill, but only the right to borrow against the policies or to pledge as collateral, clearly indicating an intent that Weyen could either borrow against them or could pledge them with someone else who would receive any such borrowed money but not that he could borrow against them, and then convey something else, or he would have used the word "and". It is significant that the lawyer used the word "or" in the reservation of rights but it is clearly explained by the foregoing reasoning.

Thereafter, in the Defenbach argument and apparently as an afterthought, he listed the insurance policies and states his intention of making Defenbach the beneficiary. But it should be noted he never signed the Sun Life forms for change of beneficiary and Sun Life was not authorized to change the beneficiary until this was done under the insurance contracts. (Ex. 1-8)

Parol evidence may be offered to prove that a written assignment absolute in form, was intended only as security.

Dixon v. National Life, 46 N.E. 430.

And this is true even though the evidence is contrary to the clear and unambiguous language of the assignment.

Jordan v. N.Y. Life, 150 So. 419

The trial court treats life insurance as a piece of personal property—with only a single right in the insured—e. g. "Weyen intended to pledge his. . . . Life Insurance." (Memo. Opinion R. 71)

An insurance policy is a contract, a chose in action. It consists of several rights in the insured:

1. To cancel or discontinue premium payments and terminate the contract.

2. To surrender for cash in accordance with contract provisions.

3. To borrow against it, up to its loan value, as contracted.

4. The beneficiary's rights, upon death.

The right to pledge arises by operation of law; it is

a property right. One can pledge anything he owns. He cannot pledge something he has already transferred.

Weyen had already transferred to Stanfill. as trustee for the minors, the beneficial rights. He could not pledge those. He had continuing and increasing loan rights—he could pledge them—and he did to Defenbach. After he pledged them to Defenbach, Weyen could not thereafter borrow on them for he did not reserve the right to borrow in the Defenbach agreement.

Defenbach could not obtain something Weyen did not have—the beneficial rights for fifteen years.

Furthermore, the insurance contract does not permit a change of beneficiary after there is "an assignment of the policy" and Weyen had already assigned these policies to Stanfill, before he attempted to make Defenbach the beneficiary.

Now, if Weyen had lived fifteen years, the Stanfill Trust would have expired and Stanfill would have reconveyed to Weyen and Defenbach would have then come into all of Weyen's rights under the policies, including the beneficial rights.

THERE IS A SHARP CONFLICT OF AUTHORITY AS TO WHETHER AN ASSIGNMENT CHANGES THE BENEFICIARIES OF AN INSURANCE POLICY. A MAJORITY OF THE RECENT CASES HOLD THE ASSIGNMENT DOES NOT CHANGE THE BENEFICIARY AND COURTS ARE RELUCTANT TO PERMIT ASSIGNMENTS AS SECURITY FOR A LOAN TO AFFECT A BENEFICIARY.

2 Appleman on Insurance, 403.

Anderson v. Bank, 109 A. 205

Douglas v. Equitable Life, 90 So. 834

Deal v. Deal, 69 S. E. 886

This is logical for usually the beneficiary is not the insured.

Where the will designates a beneficiary other than the executor named in the policy as such, the will should govern.

134 N.Y.S. 553. In re Milmine

An instrument should be interpreted by its "four corners" and it is clear the Defenbach agreement did not contemplate Weyen's death at all but was intended only as an operating agreement. It is entirely silent as to what Defenbach should do with the proceeds of these insurance policies or with any other property, after Weyen's death. On the other hand, the Stanfill Trust expressly provides a procedure for collection and payment of the proceeds of the policies by Stanfill in the event of Weyen's death within fifteen years.

The Defenbach agreement indicates the parties intended to pledge or mortgage the insurance policies, to give Defenbach control over Weyen's income and right of borrowing against the policies.

Paragraph XII of the Defenbach agreement even provides that under certain conditions, he (Weyen) will agree to and join with Defenbach "if ordered by a vote of a majority of the creditors' committee." How could Weyen join with Defenbach in doing anything with the insurance policies or proceeds after his death? Clearly, the Defenbach agreement was in-

tended to end with Weyen's death. It states it is a Power of Attorney, which of course expires with death. While it states it is a mortgage, if so, this also makes it a lien only UPON SUCH PROPERTY AS WEYEN HAD.

Its language indicates it is nothing but a managerial operating agreement to control income and expenditures, including the borrowing rights of Weyen on insurance policies, during Weyen's life time. It is headed an "Assignment for Benefit of Creditors" but the body of the instrument determines its legal effect. In this case it is a lien UPON WEYEN'S PROPERTY and a managing agreement during life, for the benefit of the creditors joining in the agreement.

Appellants maintain that Exhibit 27

A. was intended as an operating agreement through the life of deceased.

B. Could not assign something Weyen had not reserved and did not have.

C. provides for no disposition whatever of the proceeds of the policies upon Weyen's death and gives Defenbach no instructions whatever for action after Weyen's death.

D. Expressly states it is a Power of Attorney—a Mortgage.

E. can be construed only as an assignment of the right to exercise the borrowing privileges.

F. could not change the beneficiary since the policies had been assigned to Stanfill in trust and any change thereafter was "subject to such trust assignment".

SPECIFICATION NO. VIII--EQUITY OF MRS. MAY

This is an equitable action and the court will protect the equities of all parties.

Defenbach, at the very most, should not be permitted to have the benefit of the $3,000.00 paid by Mrs. May to enable the creditors to secure the Defenbach agreement. Since Mrs. May has specifically pleaded all her rights herein in favor of the minor children, we respectfully suggest that the clerk should be ordered to pay such funds to Stanfill, as trustee for the children.

McConnell v. Henocksberg, 11 Tenn. App. 176

CONCLUSION

For the foregoing reasons the Judgment of the court below should be reversed and the proceeds of all policies directed to be paid to E. J. Stanfill as Trustee for the minor children.

Respectfully submitted,

S. DEAN ARNOLD
517 Sycamore Street
Clarkston, Washington

C. C. ROWAN
1021 Paulsen Building
Spokane, Washington

Attorneys for Appellants.